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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Leon A. Brown, Plaintiff,	:	
v.	:	File No. 1:01-CV-318
City of South Burlington and Charles Hafter, individually and as City Manager, City of South Burlington and Michael O'Neil, individually and as Chief Engineer, City South Burlington, Defendants.	:	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
(Papers 23, 25, 27 & 29)

Plaintiff Leon A. Brown filed this action against the City of South Burlington, Charles Hafter in both his individual capacity and as the City Manager of South Burlington, and Michael O'Neil in both his individual capacity and as the Chief Engineer of the City of South Burlington Fire Department. Brown asserts claims under 31 U.S.C. § 3730(h), alleging wrongful discharge under the whistleblower portion of the False Claims Act ("FCA"), and 42 U.S.C. § 1983, alleging wrongful

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discharge in retaliation for his exercise of his First Amendment right to freedom of speech. He also joins a state law claim alleging wrongful termination in violation of Vermont public policy. The case is now before this Court on Defendants' several Motions for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment.

For the following reasons, I recommend that Defendants' Motion for Summary Judgment on the Merits For All Defendants as to all Claims (Paper 23) be GRANTED in Part and DENIED in part; Defendants' Motion for Summary Judgment Based on Official Immunity for Individual Defendants as to All Claims (Paper 25) be GRANTED; Defendants' Motion for Summary Judgment as to the Release of All Claims (Paper 27) be DENIED; and Plaintiff's Motion for Partial Summary Judgment (Paper 29) be DENIED.

Background

Unless noted, the following facts are undisputed. In January 1999, Plaintiff sent an anonymous letter to the

South Burlington City Council, the South Burlington City Manager, the Federal Bureau of Investigations ("FBI"), and the Federal Emergency Management Agency ("FEMA"), and copied the letter to several local media outlets.[1] In the letter, Plaintiff accused the South Burlington Fire Chief, Defendant O'Neil, of submitting false claims to FEMA in order to obtain money.[2] (Paper 24 at 2,

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[1]Plaintiff is unsure whether he actually sent the letter to the media outlets, but the letter states that it has been copied to the WCAX-TV Channel 3 News Room, the WPTZ-TV Channel 5 News Room, and the Burlington Free Press. (Paper 34 at 2-3.)

[2]The letter read:

> Remember the 1998 Ice Storm!
> The South Burlington Fire Chief, Mike O'Neil using invoices from the South Burlington Firefighter's Association for it's own power.
>
> Obtaining FEMA currency for personal use, by submitting claims for meals which never conspired, 299 meals in fact.
>
> Not even one meal from any such service was ever supported or existed.
>
> This S.B. Fire Chief has hurt this department in such a short amount of time. Why do you think so many us on-call firefighter's have moved on. Look at the interior qualified list when the Chief started and look at the list today.
>
> Cc. South Burlington City Council: William Cimonetti, James C. Condos
> South Burlington City Manager: Chuck Hafter
> WCAX-TV ch3: News Room
> WPTZ-TV ch5: News Room
> Federal Bureau of Investigation
> Federal Emergency Management Agency

(Paper 28, Exhibit A (errors in the original).)

Paper 34 at 2, Paper 28 Exhibit A.) As a result of the letter, FEMA conducted some level of investigation into the allegations and concluded that the documentation of the meal expenses was in order.[3] (Paper 24 at 3-4. Paper 34 at 6-7.) Plaintiff was later discovered to be the author of the anonymous letter, and was given the choice of resigning or being fired. (Paper 24 at 5-6, Paper 34 at 15-16.) He chose to resign. In conjunction with his resignation, he signed a form releasing the Defendants from all further claims he might have against them in exchange for a payment of $7964.70. (Paper 24 at 6, Paper 28 Exhibit F, Paper 36 at 7.)

Three months after he resigned, Plaintiff reported the allegations about the meal reimbursements to FEMA's Inspector General's office. (Paper 24 at 6.) FEMA initiated an investigation and determined that the meal

[3]The level of investigation actually conducted is in dispute. Defendants allege that the City of South Burlington initiated its own investigation and contacted FEMA at their Boston office so that FEMA could conduct an audit. (Paper 24 at 2-4.) Plaintiff argues that there is no evidence that South Burlington ever conducted its own investigation. Instead, Plaintiff argues that Defendant Hafter asked Defendant O'Neil to conduct the audit, and that FEMA officials never spoke to anyone except Defendant O'Neil. (Paper 34 at 2-7.)

reimbursement claim was not valid. (Id.) The United States and the City entered a Stipulation to Entry of Judgment in December 2000. (Paper 24, Exhibit M.) Under the Stipulation, the City paid the United States $2500 without admitting wrongdoing and without a finding that Defendant O'Neil had used any of the money for personal use. (Id.; Paper 24 at 6.)

On January 10, 2001, Plaintiff contacted Defendants seeking reimbursement for the earned sick time he had accumulated through March 1999. (Paper 24, Exhibit G3.) Plaintiff filed the instant lawsuit on October 15, 2001. (Paper 1.)

Standard of Review

Summary judgment should be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(c), or "'[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.'" Konikoff v. Prudential Ins. Co. of Am., 234 F.3d 92, 97 (2d Cir.

2000) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). "A fact is 'material' if it 'might affect the outcome of the suit under the governing law.'" O'Hara v. Weeks Marine, Inc., 294 F.3d 54, 61 (2d Cir. 2002) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). An issue of fact is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

"When determining whether there is a genuine issue of fact to be tried, the court must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought." Winter v. United States, 196 F.3d 339, 346 (2d Cir. 1999)(citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)). As to any claim or essential element for which the non-moving party bears the burden of proof at trial, the non-moving party must make a showing sufficient to establish the existence of that claim or element. Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 95 (2d

Cir. 1998)(citing Celotex, 477 U.S. at 324; DiCola v. Swissre Holding, Inc., 996 F.2d 30, 32 (2d Cir. 1993)). "Credibility assessments, choices between conflicting versions of the events, and the weighing of evidence are matters for the jury, not for the court on a motion for summary judgment." Fischl v. Armitage, 128 F.3d 50, 55 (2d Cir. 1997). Summary judgment is mandated, however, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Discussion

A. Release of all Claims

Defendants argue that Plaintiff is barred from asserting any of these claims, because he signed a general release relinquishing all claims against the Defendants in conjunction with his resignation. (Paper 28, Exhibit F.) Plaintiff does not dispute the fact

that he signed the release, but argues that the release is void because it was based on fraud.[4]

"A valid release is a bar to recovery on the claim released, so long as it is not rescinded by an offer to return the consideration insofar as it lies within the power of the person who has executed the release." Economou v. Economou, 136 Vt. 611, 619 (1979). "Courts will not enforce a release that is the product of fraud." Allen v. Westpoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991)).

"Fraud in the inducement is 'an intentional misrepresentation of fact affecting the essences of the

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[4]Plaintiff also argues, with respect to the FCA claim, that the release is invalid because the government did not approve it. In support of this contention, he cites 31 U.S.C. 3730(b), United States ex rel. Green v. Northrop Corp., 59 F.3d 953(9th Cir. 1995) and United States ex rel. DeCarlo v. Kiewit/AFC Enters., 937 F. Supp. 1039 (S.D.N.Y. 1996). These authorities are all inapposite, however, as they speak to the dismissal of a qui tam action brought under the FCA. The FCA itself does not require government participation or approval of a settlement of a private action brought under 31 U.S.C. 3730(h), and the court in Northrup explicitly declined to consider the validity of a pre-filing release of an action under 3730(h). Northrup, 59 F.3d at 43 n.12. The only cases that this Court has found that deal with the release of a claim under 3730(h) held that the government's permission was not required, so long as the release or settlement was not being used to disguise funds actually owed the government, because the cause of action was the property of the individual employee and not of the government. United States ex rel. Smith v. First Am. Health Care, 1999 U.S. Dist. LEXIS 6181 at *19 n.4 (6th Cir. 1999); United States ex rel. Summit v. Michael Baker Corp., 40 F. Supp. 2d 772, 776 (E.D.Va. 1999).

transaction, false when made and known to be false by the maker, not open to the defrauded party's knowledge, and relied upon by the defrauded party to its damage.'" Turkovich v. APC Capital Partners, LLC, 2002 U.S. Dist. LEXIS 25876 at *17 (D.Vt. 2002)(quoting Ben & Jerry's Homemade, Inc., v. La Soul, Inc., 983 F. Supp. 504, 506 (D. Vt. 1997)). Any reliance on a misrepresentation must be justifiable. Sugarline Assocs. v. Alpen Assocs., 155 Vt. 437, 445 (1990).

In this case, Plaintiff alleges that the Defendants induced him to sign the release by telling him that all of the claims in his letter were false, and supported their assertions with false, fabricated evidence. Specifically, Plaintiff cites a memo by Frederick Costello, in which he states that he had investigated the allegations of a false claim and determined that everything was in order. (See Paper 15, Exhibit 4.) Plaintiff argues that, although this document was not fraudulent, it was based on the fraudulent representations of the Defendants in their efforts at a

cover-up. (Paper 36 at 8 and Exhibit F, Paper 15, Exhibit 11.) Plaintiff cites the subsequent investigation by FEMA and the settlement between FEMA and the Defendants as proof that there was a fraudulent cover-up.

Defendants argue that Plaintiff has not submitted any proof that these documents were fraudulent rather than mistaken. Although that may be true, questions of the Defendants' intent are questions of fact and should be left for the jury. "The validity of a release is a peculiarly fact-sensitive inquiry." Livingston v. Adirondack Beverage Co., 141 F.3d 434, 437-38 (2d Cir. 1998). As such, I recommend that Defendants' motion for summary judgment as to the release of all claims be denied.[5]

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[5]In addition, there seems to be some dispute as to whether Plaintiff consulted a lawyer before signing the release. A release of federal claims is governed by federal law, which requires that the release of claims was knowing and voluntary, and "[t]he 'totality of the circumstances' test is used to determine whether a release of Federal claims is knowing and voluntary." Depalma v. Realty IQ Corp., 2002 U.S. Dist. LEXIS 4911, at * 8 (S.D.N.Y. 2002)(citations omitted). This inquiry requires the examination of several factors, including the plaintiff's education and business experience, whether the plaintiff had a role in deciding the terms of the agreement, and whether the plaintiff consulted with an attorney. Id. (citations omitted).

B. Claims against Defendants Hafter and O'Neil in Their Individual Capacity

Defendants also seek summary judgment as to all claims against Defendants Hafter and O'Neil in their individual capacities. They argue that the state law claim may only be brought against the municipality under Vermont law, citing Vt. Stat. Ann. tit. 24, § 901. (Paper 25.) In addition, they argue that Plaintiff's FCA retaliatory discharge claim must be dismissed against them because "individual supervisors are not 'employers' under the statute." (Id.) Finally, they submit that Defendants Hafter and O'Neil are entitled to qualified immunity as to Plaintiff's First Amendment claim. (Id.) Plaintiff opposes this motion, arguing that the Defendants can not establish qualified immunity as to the First Amendment claim or the state law claim, and that the FCA is comprehensive enough to include supervisors in the definition of employers.

1. State Law Claim

Under the Vermont statute cited by Defendants,

> Where an action is given to any appointed or elected municipal officer or town school district officer, the action shall be brought in the name of the town in which the officer serves and in the case of a town school district officer in the name of the town school district. If the action is given against such officers, it shall be brought against such town or town school district, as the case may be.

Vt. Stat. Ann. tit. 24, § 901. This statute applies to any state law action brought against municipal officers, and therefore the state law claim against Defendants O'Neil and Hafter should be dismissed.[6] See Gallipo v. City of Rutland, 173 Vt. 223, 238-239 (2001).

2. Retaliatory Discharge Under the FCA

Under the FCA, an employee who is fired by his employer in retaliation for protected activity under the act may bring an action against that employer. 31 U.S.C. 3730(h). The term employer is not defined in the Act, but "Section 3730(h) plainly mentions only the 'employer' as incurring liability, and the word 'employer' does not normally apply to a supervisor in

[6]As an aside, Plaintiff did not respond directly to this argument, arguing instead that the Defendants were not entitled to qualified immunity for the state law claim. (Paper 37 at 11-12.)

his individual capacity." Yesudian ex rel. U.S. v. Howard University, 270 F.3d 969, 972 (D.C. Cir. 2001)(retaliatory discharge under the FCA). Defendants O'Neil and Hafter are not employers under the FCA, and therefore the FCA claim against them should be dismissed.

3. Qualified Immunity

"The defense of qualified immunity shields government agents 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" McEvoy v. Spencer, 124 F.3d 92, 97 (2d Cir. 1997)(quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). "A qualified immunity defense is established if (a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law." Tierney v. Davidson, 133 F.3d 189, 196 (2d Cir. 1998) (quoting Salim v. Proulx, 93 F.3d 86, 89 (2d Cir. 1996).

A public employee may be discharged because of speech if his First Amendment interest is outweighed by "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" Waters v. Churchill, 511 U.S. 661, 695-695 (1994) (plurality opinion)(quoting Connick v. Myers, 461 U.S. 138, 142 (1983)(quoting Pickering, 391 U.S. at 568)). In considering whether the employer's interest in efficiency outweighs the employee's interest in speech, the court "must consider whether the statement sought to be protected 'impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships . . . or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.'" Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 164 (2d. Cir. 2001) (quoting Lewis v. Cowen, 165 F.3d 154, 165 (2d Cir. 1999)(citation omitted)).

Plaintiff argues that any fear of disruption was a "mere claim of disruption created by the Defendant's own

dissemination of the letter and disparaging of the true account" (Paper 37 at 7). Defendants, however, have submitted uncontradicted evidence of their fears of disruption and the investigation of possible disruption at the time of the incident, including statements by Plaintiff's supervisor that he would have a hard time working with Plaintiff as a result of this incident and statements from other members of the department that the method Plaintiff used to lodge his complaint would make it difficult for them to trust him. (See Paper 24, Exhibit E, F.) Defendants have shown that they acted in good faith in discharging Plaintiff based on a reasonable fear of disruption, and that it was objectively reasonable for them to believe that they could lawfully fire Plaintiff based on the potential disruptive effects of his letter. Defendants are therefore entitled to qualified immunity on Plaintiff's § 1983 claim.[7]

[7]Plaintiff argues that Sheppard v. Beerman, 94 F.3d 823, 828 (2d Cir. 1996), "stands for precisely the issue before this Court: where there is retaliatory against a whistleblower exercising First Amendment rights, as there certainly is here, there is no qualified immunity." (Paper 37 at

C. **Defendants' Motion for Summary Judgment on the Merits as to All Claims**

1. Plaintiff's First Amendment Claim

Defendants first seek summary judgment on Plaintiff's claim, pursuant to 42 U.S.C. § 1983, that they violated his First Amendment right to freedom of speech by firing him. Defendants argue that Plaintiff's letter as a whole was not related to matters of public concern and was personally motivated. They also argue that letter was defamatory, and therefore unprotected. Finally, they argue that the City's interest in maintaining the efficient operation of the fire department was great and the fear that the letter would disrupt the department far outweighed any first amendment interest Plaintiff did have.

Plaintiff counters that Defendants have failed to

7.) In that case, however, qualified immunity was deemed inappropriate at the judgment on the pleadings stage, because the plaintiff had made allegations of unconstitutional motive that the court felt might be borne out during discovery. Sheppard, 94 F.3d at 828-829. After discovery, the district court granted summary judgment to the defendant, finding that there was no evidence to support a finding of unconstitutional motive and that the defendant was entitled to qualified immunity. Sheppard v. Beerman, 190 F. Supp. 2d 361 (S.D.N.Y. 2002), aff'd, 317 F.3d 351 (2d Cir. 2003).

show that they reasonably believed that the letter would interfere with or disrupt the efficient operation of the fire department, and that any disruptive effect came from Defendants' decision to publicize the letter within the department.

For Plaintiff to prevail on his First Amendment claim, he "must prove by a preponderance of the evidence that (1) the expression at issue was constitutionally protected, (2) the alleged retaliatory action adversely affected his constitutionally protected expression, and (3) a causal relationship existed between the constitutionally protected expression and the retaliatory action." Camacho v. Brandon, No. 01-9117, slip op. at 5993 (2d Cir. Jan. 10, 2003)(Miner, J.)(citing Dawes v. Walker, 239 F.3d 489, 492 (2d Cir. 2001), overruled in part on other grounds by, Phelps v. Kapnolas, 308 F.3d 180, 187 n.6 (2d Cir. 2002)). The first part of this inquiry, whether the speech is protected, is a question of law; the second and third parts are questions of fact. Czurlanis v. Albanese, 721

F.2d 98, 105 (3d Cir. 1983) (citing Connick, 461 U.S. at 150 n. 10 ("we are compelled to examine for ourselves the statements in issue and the circumstances under which they are made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.")).

In Pickering v. the Board of Education OF Township High School District 205, Will County, the Supreme Court recognized that public employers may not discharge employees in retaliation for protected speech. 391 U.S. 563, 574 (1968). Not all speech is protected, however.

> To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"

Waters v. Churchill, 511 U.S. 661, 695-695 (1994) (plurality opinion)(quoting Connick v. Myers, 461 U.S. 138, 142 (1983)(quoting Pickering, 391 U.S. at 568)).

The first question, then, is whether Plaintiff's speech was on a matter of public concern. A public employee's speech is on matters of public concern when the speech relates to a matter of political, social or other concern to the community. Connick, 461 U.S. at 141. "A public employee's speech on matters of purely personal interest or internal office affairs does not constitute a matter of public concern and is therefore not entitled to constitutional protection." Heil v. Santoro, 1997 U.S. Dist. LEXIS 2583 at *13 (S.D.N.Y. 1997) aff'd, 147 F.3d 103 (2d Cir. 1998).

In this case, Plaintiff's letter involved allegations of fraud on the part of the South Burlington Fire Chief, Defendant O'Neil. (Paper 23 at 2.) In addition, the letter made reference to the fact that on-call firefighters were unhappy with the performance of O'Neil and that many had "moved on" since O'Neil became chief. The statements regarding the dissatisfaction of the on-call firefighters with O'Neil are not protected, as they fall under the category of speech on purely internal

office affairs. The portion of the letter relating to suspected fraud, however, is clearly a matter of public concern. The public has a definite interest in ensuring that local government agencies do not commit fraud on the federal government.

Defendants argue that the letter is defamatory and therefore unprotected. Specifically, Defendants argue that the following statements allege that O'Neil stole money for his own personal use: "The South Burlington Fire Chief, Mike O'Neil using invoices from the South Burlington Firefighter's Association for its's own power. Obtaining FEMA currency for personal use, by submitting claims for meals which never conspired, 299 meals in fact. Not even one meal from any such service was ever supported or existed." (Paper 34 at 2 (errors in the original).) Construing the facts in favor of Plaintiff, however, it is difficult to say that the letter is per se defamatory. Although it could be argued that Plaintiff meant that O'Neil took the money in question for his own personal use, it could also be

argued that Plaintiff's letter, though inelegant and grammatically incorrect, simply meant that O'Neil took the money for the use of the department. For summary judgment purposes, therefore, the statements about the alleged fraud are protected speech.

Even though Plaintiff's speech was on a matter of public interest, it might not be protected. The second part of the Pickering balancing test requires that the court "weigh the employee's interest in speaking against the government's interest in promoting the efficiency of the services it performs through its employees." Sheppard v. Beerman, 190 F. Supp. 2d 361, 371 (S.D.N.Y. 2002), aff'd, 317 F.3d 351 (2d Cir. 2003) (citations omitted). "Under the balancing test, the governmental employer may defeat the claim by demonstrating that it 'reasonably believed that the speech would potentially interfere with or disrupt the government's activities, and can persuade the court that the potential disruptiveness was sufficient to outweigh the First Amendment value of that speech.'" Pappas v. Giuliani,

290 F.3d 143, 145-146 (2d Cir. 2002)(quoting Heil v. Santoro, 147 F.3d 103, 109-110 (2d Cir. 1998)); see also Camacho v. Brandon, No. 01-9117, slip op. at 5993 (2d Cir. Jan. 10, 2003). "Only if an employee can satisfy both parts of this test, thus proving his or her speech was protected, should the court move on to determining whether the last two elements of a cause of action for retaliation -- adverse action and motivation -- are present." Sheppard, 190 F. Supp. 2d at 361.

"Substantial weight is accorded the government employer's prediction that given speech has the potential for disruptiveness, but its prediction must be reasonable. Thus, an employer that has received a report of such speech must make a reasonable investigation before deciding to take action against the employee." Heil, 147 F.3d at 109-110 (citing Waters v. Churchill, 511 U.S. 661, 673, 677 (1994)(plurality opinion)). The time, place and manner of a particular communication, even of protected speech, may threaten the institutional efficiency of the government employer,

tipping the balance required by Pickering in favor of the employer. See Janusaitis v. Middlebury Volunteer Fire Dept., 607 F.2d 17, 28-29 (2d Cir. 1979) (citing Givhan v. Western Consolidated School, 439 U.S. 410 (1979)).

In this case, Defendants argue that the letter publicized an internal employee grievance against the fire department, and did so in such a manner as "to create or exacerbate internal tensions between the Department's unionized and non-unionized firefighters, to undermine the Department's chain of command, and to damage relationships of trust among the Department's members." (Paper 25 at 3.) In support of these assertions, they cite the deposition of Ken Datillo, who testified that members of the department felt that the letter was untrustworthy because it was anonymous, that even if the allegations were true they should have been handled differently, and that members of the department did not feel they could trust the author of the letter. (Paper 24, Exhibit E.) In addition, they cite a memo

issued on March 8, 1999, in which O'Neil stated that members of the volunteer and paid staff had been coming into his office to express dismay at the way Plaintiff handled the situation and that members would have a hard time trusting the person who wrote the letter. (Paper 24, Exhibit F.) O'Neil also noted that "Captain Datillo feels that if FF Brown were to remain, it could lead to a 'hostile and very uncomfortable atmosphere'" and that Plaintiff's commanding officer "stated that he would have a 'hard time working with FF Brown, and that it would be difficult to trust Brown if they had to work together.'" (Id.) Finally, O'Neil noted that the Assistant Chief, Bob Wheel, felt that Plaintiff should be dismissed because he "tried to throw suspicion on the call staff, to make it seem that it was a call person who wrote the letter. This aspect of the incident could have a devastating effect on this department." (Id.) In order to avoid the disruptive effects of the manner in which Plaintiff handled the incident, O'Neil recommended that Plaintiff be discharged. (Id.)

Plaintiff argues that the letter was not actually a dispute about internal affairs. In the last paragraph of the letter he wrote, "This S.B. Fire Chief has hurt this department in such a short amount of time. Why do you think so many us on call firefighter's have moved on. Look at the interior qualified firefighter list when the Chief started and look at the list today." (Paper 34 at 2 (errors in the original)). Plaintiff claims that this portion was entirely made up, because he was afraid that his letter would lead to retaliation. He argues that, because this portion of the letter was simply an effort to disguise his identity, it should also be protected. In addition, he argues that Defendants themselves are to blame for any strife the letter created, as they let the firefighters know about the letter in the first place. Finally, Plaintiff argues that he did not make the allegations public, even though the letter stated that it was being sent to the local media. Plaintiff argues that he does not recall actually sending the letter to the media, and even if he

did, there is no evidence that the local media contacted the department or publicized the allegations. (Paper 34 at 2; 33 at 15-16.)

Plaintiff's arguments fail. First, an anonymous letter publicizing internal grievances would be cause for discharge absent the protected speech. The fact that the allegations were false only buttresses the Fire Department's case for dismissal, as such activity could reasonably lead to actual strife between volunteer and paid staff. Plaintiff argues that the last paragraph of the letter should not be considered by this Court, as the allegations contained therein "were not real, but a feint to avoid retaliation. . . They were the wrapper for the protected speech and inseparable from it. They were not real grievances. Their only existence was to convey protected speech." (Paper 33 at 12.)

In this case, Defendants could reasonably believe that an anonymous letter that contained allegations that on-call firefighters were dissatisfied with the fire chief could lead to strife within the department, even

if the allegations were in fact false. The fact that Defendants publicized the letter within the department may have exacerbated that strife. It was also part of a reasonable effort to prevent strife, however. The letter stated that it was being sent to the local media, and Defendants have submitted evidence that they disseminated the letter within the department so that members would not find out about the allegations from an outside source. (Paper 24, Exhibit E.)

Plaintiff's argument that the last paragraph of the letter was merely a ruse and therefore should not be considered in the Pickering balancing is misplaced. Plaintiff's false allegations of internal grievances were not necessary to convey the allegations of fraud. By adding in the grievances, Plaintiff gave the Department a reasonable fear that the letter would be disruptive, thus giving Defendants cause for his termination despite his First Amendment protections.[8]

[8]This does not mean, however, that Defendants necessarily had a legitimate reason for discharging Plaintiff in spite of the protections of the FCA. The inquiry under the FCA is a separate inquiry from whether speech is protected by the constitution. As will be discussed, whether

Although fear of termination is understandable, an employee should not be reckless in protecting himself from such termination.

Finally, Plaintiff argues that Defendants can not claim the protection of the reasonable belief of disruption because the investigation into the allegations of the letter was "worse than a sham; it was another fraud based on a new false document." (Paper 33 at 12.) Plaintiff misunderstands the meaning and purpose of this requirement. In asserting a defense that an employee was discharged because of a reasonable belief of disruption, the "employer must make a reasonable investigation before deciding to take action against the employee." Heil v. Santoro, 147 F.3d 103, 109-110 (2d Cir. 1998) (citing Waters v. Churchill, 511 U.S. 661, 673, 677 (1994)(plurality opinion)). The investigation required is not an investigation into the truth of the protected speech, but rather an

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the potential for disruption by itself would support Plaintiff's discharge under the FCA, and whether Defendants motivation for the discharge was based on the potential for disruption or any protected activity of Plaintiff are questions of fact for the jury to decide.

investigation into whether the speech will cause disruption. Defendants have submitted evidence that they performed such an investigation by talking to various members of the department and Plaintiff's supervising officer. (Paper 24, Exhibit E, F.) Plaintiff makes no argument and offers no evidence to rebut Defendants' evidence of investigation and potential disruption. Thus, Defendants' motion for summary judgment on the First Amendment claim should be granted.

2. False Claims Act

Defendants argue that they are entitled to summary judgment on Plaintiff's retaliatory discharge claim under the False Claims Act. They argue that Plaintiff was not fired for a protected activity, and that, even if "there was a causal relationship between the Plaintiff's termination and an action in furtherance of whistle blowing activity, the City's interest in terminating Plaintiff for his other unprotected conduct . . . justified Mr. Brown's separation from the

Department." (Paper 23 at 16-17.) Plaintiff counters that permitting Defendants to prevail on this argument "would utterly defeat the purpose of the False Claims Act to protect such reports of official malfeasance." (Paper 33.)

Under the False Claims Act:

> Any employee who is discharged . . . by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

31 U.S.C. § 3730(h). "To sustain an action under § 3730(h), a plaintiff must prove (1) that he engaged in conduct protected under the statute, (2) that defendants were aware of his conduct, and (3) that he was terminated in retaliation for his conduct." Moor-Jankowski v. The Board of Trustees of New York University, 1998 U.S. Dist. LEXIS 12305 at *32 (S.D.N.Y. 1998).

To engage in protected activity, a plaintiff need not

have filed a qui tam action, but "must demonstrate that [his] investigation, inquiries, and/or testimony were directed at exposing a fraud upon the government." Luckey v. Baxter Healthcare Corp., 2 F. Supp. 2d 1034 (N.D. Ill. 1998). "[A]n employee engages in protected activity where (1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is possibly committing fraud against the government." Moore v. Cal. Inst. of Tech. Jet Propulsion Lab., 275 F.3d 838, 845 (9th Cir. 2002). In this case, Plaintiff suspected that false receipts had been submitted to FEMA and wrote a letter to the Federal Bureau of Investigations ("FBI") and FEMA, among other recipients, including Defendants. Writing letters to the FBI and FEMA are actions "directed at exposing a fraud upon the government." It is true that the letter contained false statements regarding internal grievances, but a reasonable jury could conclude that at least the first portion of the letter is protected under the FCA. In

addition the copies to the City establish that Defendants knew of Plaintiff's activities.

Plaintiff must also establish, by a preponderance of the evidence, that his discharge was in retaliation for his protected activity. He asserts that, because Defendants have admitted that he was terminated because of the letter, Defendants' liability has been established. (Paper 29.) This assertion misstates the facts and the law. Although Defendants did terminate Plaintiff as a direct result of the letter, they did not necessarily do so in retaliation for the protected portion. It is Plaintiff's burden to demonstrate that he was terminated in retaliation for his protected activity. A reasonable jury could find that Plaintiff was terminated, not because of any protected activity, but because of other, legitimate reasons.

Defendants have asserted that Plaintiff's termination was based on several factors, including the fear that Plaintiff's false statements regarding the volunteer staff's dissatisfaction with Chief O'Neil, would lead to

disruption within the department. These statements may have been, as Plaintiff asserts, "self-evidently an effort to divert attention" from the true author of the letter. (Paper 29.) Nevertheless, a reasonable jury could find that the statements could create strife within the department, and could find that the potential for disruption that the false statements would create was a legitimate reason for Plaintiff's discharge. Likewise, a reasonable jury could find that Defendants' stated reasons were merely a pretext for an illegal discharge.

Defendants assert that they are entitled to summary judgment on this claim as well as the § 1983 claim because the discharge was based on the reasonable fear of disruption. The difference between an action for retaliatory discharge under the FCA and an action for wrongful discharge in violation of an employee's First Amendment rights is the Pickering balancing test. Counsel have cited no authority and this Court can find none, that allows a defendant to avoid a claim for

retaliatory discharge under the FCA upon the mere showing that a report would be disruptive. A defendant may assert that the fear of disruption was a lawful, alternative reason for the discharge, but whether the discharge was in fact because of a fear of disruption or because of some protected activity of Plaintiff is a question for the finder of fact to decide.

3. Discharge in Violation of Vermont Public Policy

Defendants also seek summary judgment on Plaintiff's state law claim, arguing that Vermont has no clear and compelling policy "promoting whistle blowing without employment consequence." (Paper 23.) Plaintiff counters that Vermont does have a clear and compelling interest in preventing retaliatory discharge.

"Although generally an at-will employment contract may be terminated by either party to the contract at any time, with or without cause,. . .[the Vermont Supreme Court] has recognized an exception to this general rule when the employer's actions contravene clear and

compelling public policy." Murray v. St. Michael's College, 164 Vt. 205, 208-209 (1995) (recognizing a strong public policy against discharge in retaliation for filing a workers' compensation claim); see also Payne v. Rosenthal, 147 VT 488 (1986)("the discharge of an employee solely on the basis of age is a practice so contrary to our society's concern for providing equity and justice that there is a clear and compelling public policy against it"). The Vermont Supreme Court has not yet recognized an exception to at-will employment for retaliation against whistleblowers, but this Court has. See Burt v. Standard Register Co., No. 90-295, slip op. at 5 (D. Vt June 19, 1992) (Coffrin, J.). Therefore, I recommend that Defendants' motion be denied as to this claim.

D. Plaintiff's Motion for Partial Summary Judgment

Finally, Plaintiff has filed a motion for partial summary judgment on the question of liability. He argues that Defendants have conceded that the anonymous letter Plaintiff wrote was the underlying reason for his

discharge, and that the letter was clearly protected activity under both the FCA and the First Amendment. He argues, therefore, that there is no remaining question of fact as to Defendants' liability for wrongful discharge under the FCA, § 1983 or Vermont law.

As already discussed, Defendants have submitted evidence that Plaintiff's discharge stemmed from the reasonable belief that the anonymous nature of the letter and the false statements regarding the internal grievances therein would cause disruption within the Department, and therefore Plaintiff's letter fails the Pickering balancing test. In addition, a sufficient fact question remains as to the nexus between Plaintiff's discharge and any protected activity under the FCA or Vermont public policy. Plaintiff's motion should therefore be denied.

Conclusion

For the foregoing reasons, I recommend that Defendants' Motion for Summary Judgment on the Merits For All Defendants as to all Claims (Paper 23) be

GRANTED in Part and DENIED in part; Defendants' Motion for Summary Judgment Based on Official Immunity for Individual Defendants as to All Claims (Paper 25) be GRANTED; Defendants' Motion for Summary Judgment as to the Release of All Claims (Paper 27) be DENIED; and Plaintiff's Motion for Partial Summary Judgment (Paper 29) be DENIED.

Dated at Burlington, in the District of Vermont, this 7th day of April, 2003.

Jerome J. Niedermeier
United States Magistrate Judge

Any party may object to this Report and Recommendation within 10 days after service by filing with the clerk of the court and serving on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Failure to file objections within the specified time waives the right to appeal the District Court's order. See Local Rules 72.1, 72.3, 73.1; 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b), 6(a) and 6(e).